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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DAVID FRANCIS DELMARK, Defendant and Appellant.	B203866 (Los Angeles County Super. Ct. No. BA304885)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mary H. Strobel, Judge. Reversed.

Marcia R. Clark, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and Michael R. Johnsen, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant David Francis Delmark appeals from a judgment entered after a jury convicted him of one count of cultivating marijuana. (Health & Saf. Code, § 11358.)[1] The jury deadlocked on a second charge of possession of marijuana for sale (§ 11359), and that charge was dismissed. Appellant was placed on formal probation for three years.

We are asked to decide whether the trial court erred in instructing the jury on the maximum amount of medical marijuana that appellant could lawfully possess. Thus, we must decide whether § 11362.5 (the Compassionate Use Act or CUA), approved by California voters in 1996, was unconstitutionally amended by section 11362.77 (the Medical Marijuana Program Act or MMPA) which imposed numerical limits on the amount of marijuana that can lawfully be possessed.

We find that because the CUA, a statute enacted by voter initiative, may be changed only with the approval of the electorate, the MMPA unconstitutionally amends the CUA by imposing numerical limits on a patient's medical needs. Accordingly, the trial court erred in instructing the jury on numerical limits, and we reverse.

FACTS AND PROCEDURAL HISTORY

On May 12, 2006, Los Angeles Police Department Detective Ronald Hodges responded to a report of gunshots fired at appellant's apartment. No one was in the apartment when Detective Hodges entered it. In the apartment, he found 36 small marijuana seedlings in trays and 25 mature marijuana plants between one and three feet in height. The marijuana cultivation operation included timed growing lamps, fertilizer, plant food, and planting soils. Detective Hodges also found marijuana plants in the closets, some of which were buds with the leaves removed. Detective Hodges did not find dried marijuana, scales, or pay/owe sheets in the apartment.

When appellant and his girlfriend, Kristina Allison (Allison), arrived at the apartment at 1:00 a.m., they were arrested. Appellant told Detective Hodges that he had

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[1] All further statutory references are to the Health and Safety Code unless otherwise indicated.

a doctor's recommendation to use marijuana but he did not have it with him. A criminalist employed by the scientific investigation division of the Los Angeles Police Department analyzed the marijuana and determined that it amounted to a net weight of 3200 grams.

At trial, appellant testified that Allison worked at a marijuana dispensary and had received a medical recommendation for marijuana from Dr. Armond Tollette. Dr. Tollette also gave appellant a medical recommendation but did not recommend a particular dosage. Dr. Tollette recommended that he ingest it in food.

Appellant testified that he researched the medical marijuana laws and believed each person was allowed to grow 12 plants, so he planted 24 for himself and Allison. He purchased the growing equipment from two men named Thick Neck and Clone, who also had medical marijuana recommendations. Appellant agreed to help Thick Neck and Clone sell marijuana to dispensaries and provide plants to them in exchange for deeply discounted equipment. He purchased marijuana plants from the dispensary at which Allison worked, and of which he and Allison were members. He believed that based on the number of plants with buds he intended to ingest, his yield did not exceed eight ounces.

The parties stipulated that Dr. Tollette pled guilty to felony health care fraud on January 10, 2007. Dr. Tollette was declared unavailable as a witness and his preliminary hearing testimony was read before the jury. Dr. Tollette testified that he was a licensed physician authorized to recommend marijuana usage to patients. On February 3, 2006, he examined and interviewed appellant, who suffered from migraines which caused nausea, vomiting, and loss of appetite. Appellant suffered from insomnia, had a history of anxiety, and as a child suffered from attention deficit disorder. Dr. Tollette issued a physician's statement authorizing appellant to use medical marijuana and recommending that he use it by vaporizing it, eating it, or as a tincture. Dr. Tollette informed appellant that more marijuana is required than as described in the MMPA if it is ingested or used as a tincture, rather than smoked. Dr. Tollette did not recommend a particular dosage

because each patient has a different tolerance level. Dr. Tollette previously issued a physician's statement for marijuana use for Allison on December 15, 2005.

Chris Conrad (Conrad) testified on appellant's behalf as a medical marijuana expert that an appropriate dosage of marijuana for an ill person is about 16 ounces per month. Conrad testified that appellant's grow would yield about four to eight ounces of dried bud, which would provide two ounces per month for two months. Wet weight, which is the measurement used by the police laboratory, includes water within the growing plants.

Allison testified on behalf of the People that she told appellant that he could easily and inexpensively obtain a medical marijuana prescription from Dr. Tollette. Appellant told her that he wanted a prescription to keep out of trouble and make his use legal. Allison knew that appellant was anxious and had sleeping problems.

Over defense counsel's objection, the trial court gave the following instruction to the jury: "A patient may maintain no more than six mature or 12 immature marijuana plants per qualified patient. If a qualified patient has a doctor's oral or written recommendation that this quantity does not meet the patient's medical needs, the qualified patient may possess an amount of marijuana consistent with the patient's needs."

DISCUSSION

The MMPA is an unconstitutional amendment of the CUA

1. The parties' contentions

The main thrust of appellant's argument is that the trial court erred in instructing the jury with respect to the amount of marijuana a qualified patient may legally maintain because section 11362.77 of the MMPA was not intended to apply to an in-court CUA defense, but was intended to serve only as a guide for law enforcement officers in making arrests.[2]

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[2] Appellant contends that the MMPA's requirement that each qualified patient may maintain no more than six mature or 12 immature marijuana plants was intended to be a

In his reply brief, appellant agrees with the People that section 11362.77 is unconstitutional, but does not agree that the instruction was harmless error. Nor does appellant concede that the trial court properly interpreted section 11362.77 to be applicable to an in-court CUA defense.

The People argue that to the extent section 11362.77 of the MMPA limits an in-court CUA defense, it is unconstitutionally amendatory. The People rely on two cases, acknowledging that a petition for review has been granted in both, which held that section 11362.77 of the MMPA is unconstitutional because it amends the CUA, *People v. Phomphakdy,* review granted October 28, 2008, S166565 and *People v. Kelly,* review granted August 13, 2008, S164830. Indeed, in *Phomphakdy,* the Third District reversed

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guideline for police officers in making arrests, rather than a standard to be used by a jury in determining whether an amount of marijuana is reasonably related to a defendant's needs in the context of a criminal trial. He makes the following arguments in support of his contention: (1) the MMPA was intended to expand access to medical marijuana afforded by the CUA, and the imposition of such restriction would require more proof to establish the justification for the amount possessed than required before the enactment of the MMPA; (2) section 11362.77, subdivision (b) which permits a patient to possess an amount consistent with medical needs as recommended by a doctor, and section 11362.77, subdivision (c), which permits individual counties and cities to set limits exceeding section 11362.77, subdivision (a), support the interpretation that the amounts in section 11362.77, subdivision (a) were meant to be guidelines for police officers, not jurors; (3) CALCRIM No. 2370, published two years after the enactment of the MMPA, does not set a limit on quantities, stating: "The amount of marijuana possessed or cultivated must be reasonably related to the patient's current medical needs"; (4) the holdings of *People v. Wright* (2006) 40 Cal.4th 81and *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1551 illustrate that it is the jury's duty to determine whether the amount possessed was reasonably related to the defendant's medical needs; (5) the challenged jury instruction would have unfair results because cities can adopt different limits; and (6) "the determination of whether the amount possessed by a defendant was necessary to meet his medical needs must be a subjective one that takes all of the individual factors of that case into account." Because we decide the matter based on whether the MMPA unconstitutionally amends the CUA, we need not address the foregoing contentions.

the trial court for giving a jury instruction that substantially mimicked section 11362.77, subdivision (a) of the MMPA.

Nonetheless, the People argue that giving the jury instruction was harmless error because the evidence that appellant used the marijuana for recreational use was overwhelming. The People further argue that if the constitutional error is deemed prejudicial, the remedy is to sever the unconstitutional portion of the statute or disapprove the unconstitutional application.

2. The CUA and the MMPA

The CUA was approved by California voters as Proposition 215 in 1996 and is codified at section 11362.5. (*People v. Trippet, supra,* 56 Cal.App.4th at p. 1546; *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1436.) Subdivision (d) of section 11362.5 provides: "Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician."

In 2003, the Legislature passed the MMPA, effective January 1, 2004, adding sections 11362.7 through 11362.83 to the Health and Safety Code. (*People v. Wright, supra,* 40 Cal.4th at p. 93.) The express intent of the Legislature was to: "(1) Clarify the scope of the application of the [CUA] and facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers. (2) Promote uniform and consistent application of the [CUA] among the counties within the state. (3) Enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects. (c) It is also the intent of the Legislature to address additional issues that were not included within the [CUA], and that must be resolved in order to promote the fair and orderly implementation of the [CUA]." (Stats. 2003, ch. 875, § 1, subd. (b)(1).)

The MMPA allows medical marijuana patients and their primary caregivers to voluntarily apply for an identification card that protects them against arrest for violation of state marijuana laws. (§ 11362.71, subd. (e).) The MMPA also establishes a numerical limitation on the amount of marijuana that can be lawfully possessed by a qualified patient and primary caregiver. Thus, section 11362.71, subdivision (e) immunizes persons from arrest for, among other things, cultivation of medical marijuana "in an amount established pursuant to this article." Section 11362.77, subdivision (a) states that: "A qualified patient or primary caregiver may possess no more than eight ounces of dried marijuana per qualified patient. In addition, a qualified patient or primary caregiver may also maintain no more than six mature or 12 immature marijuana plants per qualified patient." Subdivision (b) of that section states that "[i]f a qualified patient or primary caregiver has a doctor's recommendation that this quantity does not meet the qualified patient's medical needs, the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient's needs."

3. The MMPA is unconstitutionally amendatory

Article II, section 10, subdivision (c) of the California Constitution prohibits the Legislature from amending an initiative measure unless the initiative measure itself authorizes legislative amendment. (Cal. Const., art. II, § 10, subd. (c); *People v. Cooper* (2002) 27 Cal.4th 38, 44.) "An amendment is '. . . any change of the scope or effect of an existing statute, whether by addition, omission, or substitution of provisions, which does not wholly terminate its existence, whether by an act purporting to amend, repeal, revise, or supplement, or by an act independent and original in form. A statute which adds to or takes away from an existing statute is considered an amendment.'" (*Franchise Tax Bd. v. Cory* (1978) 80 Cal.App.3d 772, 776; *Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 22.)

The People concede, and our review of the CUA reveals, the CUA does not contain authorization for legislative amendment without voter approval. The People further concede, and we agree, that application of the limits of section 11362.77 to an in-court CUA defense replaces the CUA's reasonableness standard with specified, numeric

guidelines.[3] Section 11362.5, subdivision (d) of the CUA specifically provides that a patient or a patient's primary caregiver shall not be subject to laws relating to the possession or cultivation of marijuana if either possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician. (§ 11362.5, subd. (d).) But, the MMPA limits the amount of dried marijuana that a qualified patient or a primary caregiver can possess to "no more than eight ounces . . . per qualified patient" and the number of plants either can maintain to "no more than six mature or 12 immature marijuana plants per qualified patient." (§ 11362.77, subd. (a).) These numerical limits do not apply "[i]f a qualified patient or primary caregiver has a doctor's recommendation that this quantity does not meet the qualified patient's medical needs," in which case "the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient's needs." (§ 11362.77, subd. (b).)

Thus, the "personal medical purposes of the patient" set forth in section 11362.5, subdivision (d) of CUA embodies a reasonableness requirement, which is improperly amended by the numerical limits set forth in the MMPA at section 11362.77, subdivision (a). Accordingly, we agree that the MMPA is unconstitutionally amendatory.

4. The error was not harmless

We do not agree with the People that the trial court's instruction was harmless error. Misinstruction on an element of an offense must be examined under the beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18. (*People v. Flood* (1998) 18 Cal.4th 470, 502-503.) Over defense counsel's objection, the trial court gave an instruction that mirrored section 11362.77, subdivisions (a) and (b) of the MMPA as follows: "A patient may maintain no more than six mature or 12 immature

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3 The People urge that application of section 11362.77's limits to the identification card program is constitutional because it is a separate, stand alone system from the CUA, citing *County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 830. We need not address this issue, or the People's request to sever the unconstitutionally amendatory provision of the MMPA, to resolve this appeal.

marijuana plants per qualified patient. If a qualified patient has a doctor's oral or written recommendation that this quantity does not meet the patient's medical needs, the qualified patient may possess an amount of marijuana consistent with the patient's needs."

The People claim that the instruction was harmless error because the evidence was overwhelming that appellant's use of the marijuana was recreational rather than medicinal. The People assert that the evidence showed that appellant used marijuana recreationally before obtaining a recommendation; wanted a recommendation simply to legitimize his recreational use; wanted to sell marijuana legally; and smoked marijuana recreationally with Thick Neck and Clone. The People also assert that the doctor who provided the marijuana recommendation employed lax standards.

We disagree that the evidence established that the instruction did not prejudice appellant. Appellant testified that he suffered from migraines and insomnia; received a doctor's statement that did not recommend a specific dosage of marijuana; and used the marijuana to alleviate his symptoms. He researched the medical marijuana laws, and cultivated 24 plants in accordance with what he believed to be the law. Conrad testified that an ill person uses about 16 ounces of marijuana per month, and that appellant's plants yielded two ounces per month for two months. Furthermore, the jury was unable to agree on the charge that appellant possessed the marijuana for sale.

Based on the evidence here, we cannot say that it is beyond a reasonable doubt that the jury would have rejected appellant's medical marijuana defense even if the trial court had not given the challenged instructions.

The judgment is reversed.

DISPOSITION

The judgment is reversed.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST